Kerajaan Malaysia & Ors v Tay Chai Huat

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO 1–12 OF 2007
ABDULL HAMID EMBONG, KN SEGARA AND ABU SAMAH JJCA
9 SEPTEMBER 2010

Labour Law — Dismissal — High Court found dismissal of police constable to be unlawful, null and void — Appeal against decision of High Court — Whether trial judge erred — Whether disciplinary authority ('DA') ought to have called for further clarification to ascertain truth of allegations against respondent — Whether DA had absolute and unfettered discretion — Whether DA failed to fully weigh and appreciate respondent's written representation — Whether respondent denied reasonable opportunity to have his case heard before DA

The respondent was the investigation officer in the secret societies section of the Police Contingent Headquarters, Negeri Sembilan. Although complaints were made against the respondent to his superiors, he was cleared of those allegations by his superiors and continued to serve in the same capacity until 30 June 1991. From 1 July 1991 to 30 April 1995, he was granted leave with pay to study law at the International Islamic University, Kuala Lumpur. During this period of study leave he received a show cause letter dated 27 September 1993 ('the show cause letter') from the Timbalan Ketua Polis Negara ('the fourth appellant') that disciplinary action would be commenced against him pursuant to general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('General Orders 1980') with a view to his dismissal. The letter contained five charges of alleged breaches of discipline under the General Orders 1980, which were allegedly committed over a period of time between January 1982 and September 1990. Under the first charge the respondent was accused of corruptly accepting a sum of RM1,000 per month from one Chong Lee Min ('Chong') on various dates between 1 January 1989 to 18 September 1990 while under the second charge the respondent was alleged to have corruptly accepted a sum of RM200 between 1 January 1987 to 30 March 1989 and a sum of RM300 per month from one Khu Tee Sing ('Khu') between 1 April 1989 to 21 September 1990. The third charge went on to accuse the respondent of associating with Chong and Khu, knowing they were actively involved in illegal four-digit lottery in Seremban while the fourth and fifth charges were in respect of the respondent's failures to take legal action against Chong, Khu and certain others between 1 January 1982 and 21 September 1990 and to report their activities to his superior. Although the first of the alleged breaches of discipline occurred in 1982, the respondent was only asked to show cause with a view to his dismissal some 11 years later by way of the show cause letter. In his ten-page written representation, which contained

A the monthly minutes of the meetings held at the police headquarters in Seremban in the form of appendices, the respondent denied all the allegations made against him. The respondent claimed that those allegations were made by the complainants or persons who had been investigated for their involvement in illegal four-digit lottery and gambling activities. The respondent also B pointed out how he had recommended that necessary actions be taken against Chong, Khu and others who were involved in such illegal four-digit lottery activities. Despite the written representation, the respondent was found in breach of all the disciplinary charges against him and dismissed from the police force. The respondent then filed a writ of summons against the appellants for C declarations that his dismissal was unlawful, null and void and of no effect and that the respondent was entitled to his salary and benefits as an inspector of police. The trial judge found that the respondent had not been given a reasonable opportunity of being heard under art 135(2) of the Federal Constitution and that there had been a breach of the rules of natural justice, in D that the third or fourth appellant had not exercised their discretion to appoint a committee of inquiry to enable the respondent to defend himself. This was an appeal by the appellants against the decision of the High Court. The main issue to be considered in this appeal was whether the disciplinary authority ('DA') ought to have called for further clarification to ascertain the truth of the E allegations against the respondent before dismissing him.

Held, dismissing the appeal with costs:

(1) As all the information in favour of and against the respondent was already F within the knowledge of the third or fourth appellants, they should have been able to weigh and evaluate the evidence against the respondent fairly and justly and decide whether or not to seek further clarification from him. The respondent's written representation was substantiated by the minutes of the meetings held at the police headquarters, which showed G that he had recommended that appropriate action be taken against Chong, Khu and others who were involved in illegal four-digit lottery activities. As such, the respondent's written representation was not just bare denials, but the DA had not fully weighed and appreciated the respondent's representation. Further, the fact that he had been cleared of H somewhat similar allegations in the past was a factor in his favour (see paras 42–43).

(2) Under the General Orders 1980, the need for an oral hearing depends upon the circumstances of the case and is at the discretion of the DA. However, it is implicit that the DA's discretion is not absolute and that by I failing to call for further clarification the DA had effectively closed its doors to the respondent and in the process fettered its own discretion. The long delay in issuing the show cause letter and in instituting the disciplinary action against the respondent was not by itself a ground for holding that there was procedural unfairness. However, when this was

viewed together with the other circumstances of the case it should have prompted an alert DA to call for further clarification to ascertain the truth of the allegations against the respondent. Thus, the failure to hold an oral hearing when the facts justified it meant that the respondent was denied the reasonable opportunity to have his case heard before the DA (see paras 27, 29, 36 & 44–45).

[Bahasa Malaysia summary

Responden merupakan pegawai penyiasat di dalam bahagian persatuan-persatuan sulit Ibu Pejabat Polis Kontingen, Negeri Sembilan. Walaupun aduan-aduan telah dibuat terhadap responden kepada pihak atasannya, dia telah dilucutkan daripada dakwaan tersebut oleh pihak atasannya dan menyambung perkhidmatan dalam keupayaan yang sama sehingga 30 Jun 1991. Dari 1 Julai 1991 sehingga 30 April 1995, dia telah diberikan cuti berbayar untuk belajar di Universiti Islam Antarabangsa, Kuala Lumpur. Semasa tempoh cuti sambil belajar tersebut, dia telah menerima surat tunjuk sebab bertarikh 27 September 1993 ('surat tunjuk sebab') daripada Timbalan Ketua Polis Negara ('perayu keempat') bahawa tindakan tatatertib akan dimulakan terhadapnya mengikut perintah am 26 Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 ('Perintah-Perintah Am 1980') mengenai pemecatannya. Surat tersebut mengandungi lima tuduhan mengenai dakwaan pelanggaran tatatertib di bawah Perintah-Perintah Am 1980, yang mana didakwa telah dilakukan dalam tempoh antara Januari 1982 dan September 1990. Di bawah tuduhan pertama, responden dituduh dengan korup menerima RM1,000 sebulan daripada Chong Lee Min ('Chong') pada tarikh berbeza antara 1 Januari 1989 sehingga 18 September 1990 manakala di bawah tuduhan kedua responden didakwa telah dengan korup menerima RM200 antara 1 Januari 1987 sehingga 30 Mac 1989 dan RM300 sebulan daripada Khu Tee Sing ('Khu') antara 1 April 1989 sehingga 21 September 1990. Tuduhan ketiga selanjutnya mendakwa responden bersekutu dengan Chong dan Khu, dalam pengetahuan mereka secara aktif terlibat dengan loteri empat digit yang salah di sisi undang-undang di Seremban manakala tuduhan keempat dan kelima adalah berkaitan dengan kegagalan responden untuk mengambil tindakan undang-undang terhadap Chong, Khu dan beberapa orang yang lain antara 1 Januari 1982 sehingga 21 September 1990 dan membuat laporan tentang kegiatan mereka kepada pihak atasannya. Meskipun pelanggaran tatatertib pertama yang didakwa berlaku pada tahun 1982, responden hanya diminta menunjuk sebab berkenaan dengan pemecatannya 11 tahun kemudian melalui surat tunjuk sebab tersebut. Di dalam representasi bertulis sepuluh mukasuratnya, yang mana mengandungi minit-minit mesyuarat bulanan yang dijalankan di ibu pejabat polis di Seremban dalam bentuk lampiran, responden menafikan kesemua dakwaan yang dibuat terhadapnya. Responden mendakwa bahawa dakwaan-dakwaan tersebut telah dibuat oleh pengadu-pengadu atau mereka yang disiasat mengenai penglibatan mereka dalam loteri empat digit

yang salah di sisi undang-undang dan kegiatan-kegiatan berjudi. Responden juga menegaskan bahawa dia telah mencadangkan supaya tindakan tertentu diambil terhadap Chong, Khu dan lain-lain yang terlibat dalam kegiatan loteri empat digit yang salah di sisi undang-undang itu. Di sebalik representasi bertulis itu, responden didapati telah melakukan pelanggaran bagi semua tuduhan tatatertib terhadapnya dan telah dipecat daripada pasukan polis. Responden kemudian memfailkan saman writ terhadap perayu-perayu untuk deklarasi bahawa pemecatannya adalah menyalahi undang-undang, batal, tidak sah, tiada efek dan bahawa responden berhak terhadap gaji dan faedahnya sebagai inspektor polis. Hakim perbicaraan mendapati responden tidak diberi peluang yang berpatutan untuk didengar di bawah perkara 135(2) Perlembagaan Persekutuan dan bahawa terdapat pelanggaran rukun keadilan asasi, iaitu perayu ketiga atau keempat tidak melaksanakan bidang kuasa mereka dengan melantik jawatankuasa siasatan ('JS') bagi membolehkan responden untuk membela dirinya. Ini adalah rayuan oleh perayu-perayu terhadap keputusan Mahkamah Tinggi. Isu utama untuk dipertimbangkan dalam rayuan ini adalah sama ada lembaga tatatertib ('LT') seharusnya mendapatkan lebih penjelasan untuk memastikan kebenaran dakwaan terhadap responden sebelum memecatnya.

Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan kesemua maklumat yang memihak dan bertentangan responden telah berada dalam pengetahuan perayu ketiga atau keempat, mereka seharusnya dapat membuat pertimbangan dan menilai keterangan terhadap responden secara adil dan saksama dan membuat keputusan sama ada penjelasan selanjutnya harus diperolehi daripada responden. Representasi bertulis responden disahkan dengan minit-minit mesyuarat yang dijalankan di ibu pejabat polis, yang mana menunjukkan bahawa dia telah mencadangkan supaya tindakan sewajarnya patut diambil terhadap Chong, Khu dan lain-lain yang terlibat dalam kegiatan loteri empat digit yang salah di sisi undang-undang tersebut. Oleh itu, representasi bertulis responden bukan sekadar penafian semata-mata, sebaliknya LT tidak memberi pertimbangan dan penelitian sepenuhnya kepada representasi responden. Tambahan, fakta bahawa dia telah dilucutkan daripada dakwaan yang lebih kurang sama pada masa lepas merupakan faktor yang memihak kepadanya (lihat perenggan 42–43).

(2) Di bawah Perintah-Perintah Am 1980, keperluan untuk perbicaraan lisan bergantung kepada keadaan kes dan adalah dalam bidang kuasa LT. Walau bagaimanapun, adalah tersirat bahawa bidang kuasa LT tidak mutlak dan dengan kegagalan untuk meminta penjelasan selanjutnya, LT dengan efektif telah menutup pintunya terhadap responden dan dalam proses telah mengehadkan bidang kuasanya. Kelewatan yang lama dalam mengeluarkan surat tunjuk sebab dan memulakan tindakan

tatatertib terhadap responden bukanlah dengan sendirinya alasan untuk memutuskan bahawa terdapat ketidakadilan prosedur. Walau bagaimanapun, apabila ianya dilihat dengan keadaan yang lain dalam kes ini, ia seharusnya mendapat perhatian segera LT untuk meminta lebih penjelasan bagi memastikan kebenaran dakwaan terhadap responden. Oleh demikian, kegagalan untuk mengadakan perbicaraan lisan apabila fakta-fakta menjustifikasikannya bermaksud responden telah dinafikan peluang yang berpatutan untuk kesnya didengar di hadapan LT (lihat perenggan 27, 29, 36 & 44–45).]

Notes

For cases on dismissal generally, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 948–1000.

Cases referred to

Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor [2002] 2 MLJ 131, CA (refd)

Associated Provincial Pictures Houses Ltd v Wednesbury Corp [1947] 2 All ER 680 (refd)

B Surinder Singh Kanda v The Government of the Federation of Malaya [1962] MLJ 169, PC (refd)

Breen v Amalgated Engineering Union and others [1971] 2 QB 175, CA (refd)

Chai Kok Choi v Ketua Polis Negara & Ors [2008] 1 MLJ 725; [2008] 1 CLJ 113, FC (refd)

Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara Malaysia & Anor [1994] 2 MLJ 114; [1994] 2 CLJ 333, SC (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417; [2001] 2 CLJ 525, FC (refd)

Lloyd v McMahon [1987] All ER 1118 (refd)

Mat Ghaffar bin Baba v Ketua Polis Negara & Anor [1994] 2 MLJ 114; [2008] 1 CLJ 773, CA (refd)

Najar Singh v Government of Malaysia & Anor [1974] 1 MLJ 138, PC (refd)

Padfield and others v Minister of Agriculture, Fisheries and Food and others [1968] AC 997, HL (refd)

Pengarah Tanah dan Galian, Wilayah Persekutuan (in this case the appellant in the appeal was the Land Executive Committee, and not, as stated in the appeal record, the Pengarah Tanah dan Galian however, the parties made nothing of this, presumably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses — MNG Ed MLJ) v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)

R (on the application of Ewing) v Department for Constitutional Affairs [2006] 2 All ER 993 (refd)

A *R v Army Board of Defence Council, ex p Anderson* [1991] 3 All ER 375 (refd)
Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis & Anor [2008] 2 MLJ 1; [2008] 4 CLJ 881, CA (refd)
Zainal bin Hashim v Government of Malaysia [1979] 2 MLJ 276, PC (refd)

B **Legislation referred to**

Federal Constitution art 135(2)
Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general orders 4(1), (2)(f), (i), (g), 23, 26, 26(4), (5), 36, Parts II, III
Restricted Residence Act 1933

C **Appeal from**: Civil Suit No 22–140 of 1994 (High Court, Seremban)

Suzana Atan (Deputy Public Prosecutor, Attorney General's Chambers) for the appellants.
Murad Ali bin Abdullah (Rajinder Singh and Muhammad Hisham with him) (Morthi, Segaran & Co) for the respondent.

D

Abu Samah JCA:

E **[1]** This was an appeal by the appellants against the decision of the High Court, Seremban which declared the dismissal of the respondent by the third appellant as unlawful, null and void and of no effect and that he was entitled to his salary, emoluments and benefits as an inspector of police. The High Court also made an order that an enquiry be held before the deputy registrar/senior assistant registrar to determine the total amount of salary, emolument and benefits accrued to him.

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[2] It would be useful to revisit the facts in this case before we deal with the substantive appeal. The respondent joined the police force on 14 April 1979 as a probationary inspector. He was confirmed in his post on 14 April 1982. Between January 1982 and June 1991 he was the investigation officer in the secret societies section of the Police Contingent Headquarters, Negeri Sembilan. In recognition of his selfless services he received two letters of commendation from two successive Chief Police Officers of the state. The first one was on 25 March 1984. The second one was on 25 March 1989.

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[3] It is not uncommon that being directly involved in investigation into secret society activities, one would not be free from blame or accusations. It happened to him. Complaints were made against him to his superiors. He was nevertheless cleared of those allegations by his superiors.

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[4] This was what the Director of Criminal Investigations, writing on behalf of the Inspector General of Police, said in paras 2 and 3 of his letter dated 26 April 1989 to the then Chief Police Officer, Negeri Sembilan:

> 2. Setelah meneliti lapuran tuan tersebut terutamanya lampiran A, B, C, H, I dan J maka adalah jelas kepada pentadbiran ini bahawa Insp. Teh Chai Huat telah melaksanakan tugasnya dengan dedikasi dan gigih. Akibat tindak tanduknya itu beberapa orang awam yang terlibat dalam penganjuran judi dan sebagainya telah diambil tindakan undang-undang sekatan dan tidak hairanlah jika ada diantara mereka berasa marah, sakit hati dan mendendam pegawai ini.
>
> 3. Seharusnya Insp. Teh Chai Huat tidak akan lemah semangat di atas tomahan-tomahan yang diterima ataupun dilemparkan terhadapnya dan sebaliknya beliau harus meningkatkan azam membenteras apa jua bentuk maksiat dengan lebih tegas dan berkesan.

[5] The respondent continued to serve in the same capacity as the investigation officer in the secret societies section until 30 June 1991. Between 1 July 1991 and 30 April 1995 he was given leave with half pay to study law at the International Islamic University, Kuala Lumpur.

[6] It was during his period of study leave that he received the shocking news. On 4 October 1993 he was served with a show cause letter dated 27 September 1993 signed by one Mohd Yusof Said, on behalf of the fourth appellant, informing him that the fourth appellant had decided to commence disciplinary action against him pursuant to general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 ('General Orders 1980') with a view to his dismissal. The letter contained five charges of alleged breaches of discipline under general order 4(2)(f), (i) and (g) of the General Orders 1980.

[7] As these charges contain allegations spanning over a long period of time between January 1982 and September 1990 and the timing of the show cause letter coincided with the period of his study leave it is thus necessary to look at these charges in order to understand them:

> 1.1 Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia, telah didapati tidak jujur iaitu anda telah menerima wang sogokan sebanyak RM1000/– sebulan antara tempoh 1 JAN 89 hingga 30 JUN 89, 1 OGOS 89 hingga 31 JUL 90 dan 1 SEPT 90 hingga 18 SEPT 90 daripada seorang lelaki Cina bernama CHONG LEE LIN (KP: 0216980) di alamat No. 30 Jalan Tunku Munawir, Seremban, Negeri Sembilan untuk memberi perlindungan ke atas kegiatan empat ekor haram yang dijalankan olehnya di sekitar Bandar Seremban, Negeri Sembilan dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2) (f), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

A 1.2 Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia, telah didapati tidak jujur iaitu anda telah menerima wang sogokan sebanyak RM200.00 sebulan antara tempoh 1 JAN 87 hingga 31 MAC 89 dan RM300.00 sebulan antara tempoh 1 APR 89 hingga 21 SEPT 90 daripada seorang lelaki Cina bernama KHU TEE SING (KP: 7695099) di sekitar Bandar Seremban, Negeri Sembilan untuk memberi perlindungan ke atas B kegiatan empat ekor haram yang dijalankan olehnya di sekitar Bandar Seremban, Negeri Sembilan dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(f), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

C 1.3 Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia, telah didapati berkelakuan yang dianggap sebagai membiarkan kepentingan persendirian anda bercanggah dengan kewajipan-kewajipan anda sebagai Inspektor di dalam Pasukan Polis Diraja Malaysia iaitu anda telah menjalinkan perhubungan dengan CHONG LEE LIN (KP: 0216980) dan KHU TEE SING (KP:7695099) di antara tempoh 1 JAN 87 hingga 21 SEPT D 90 dengan mengetahui bahawa mereka adalah penganjur-penganjur kegiatan empat ekor haram yang bergiat di sekitar Bandar Seremban, Negeri Sembilan dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(i), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980

E 1.4 Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia, telah didapati tidak bertanggungjawab iaitu anda telah tidak mengambil tindakan Polis ke atas CHONG LEE LIN (KP: 0216980), KHU TEE SING (KP: 7695099), LUE CHAN KONG (KP: 2005446), CHONG CHAM (KP: 2473143) dan WEE LOKE CHOON (KP: 5146858) serta F sindiket mereka di antara tempoh 1 JAN 82 hingga 21 SEPT 90 bersabit kegiatan haram yang dijalan oleh mereka di sekitar Bandar Seremban, Negeri Sembilan dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(g), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980.

G 1.5 Bahawa anda, seorang Pegawai Awam, iaitu Inspektor di dalam Pasukan Polis Diraja Malaysia, telah didapati tidak bertanggungjawab iaitu anda telah tidak melaporkan kepada pegawai atasan anda mengenai kegiatan empat ekor haram yang dijalankan oleh CHONG LEE LIN (KP: 0216980), KHU TEE SING (KP: 7695099), LUE CHAN KONG (KP: 2005446), CHONG CHAM (KP: 2473143) dan WEE LOKE CHOON (KP: 5146858) serta sindiket mereka di H sekitar Bandar Seremban, Negeri Sembilan di antara tempoh 1 JAN 82 hingga 21 SEPT 90 dan oleh yang demikian, anda telah melakukan satu kesalahan tatatertib di bawah Perintah Am 4(2)(g), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980.

I **[8]** The respondent was given 16 days from the date of receipt of the letter to make his written representation.

[9] In his ten page written representation, the respondent gave a long explanation complete with relevant facts and particulars which were contained in ten appendices, namely Appendix A–K, denying all the allegations made against him. He claimed that those allegations were made by the complainants or persons who had been investigated for their involvement in four-digit illegal lottery and gambling activities. He had between 1 January 1982 and 31 December 1990 put up 59 investigation papers on secret societies activities, gambling and vice activities. He was gazetted as a gambling expert in Negeri Sembilan. As an expert he might have given evidence in court against them. He had also made numerous expert reports on gambling namely 175 reports in 1988, 85 reports in 1989 and 70 reports in 1990.

[10] He had, at the monthly meeting on the activities of secret societies in Negeri Sembilan constantly reminded the officers at the district levels to submit their respective reports on such activities at district levels or ticked them off for not submitting such reports. The minutes of these meetings also showed that even the chairman had to remind his officers at district levels.

[11] The respondent pointed out that the meetings had also, among others, discussed the involvement of Chong Lee Lin, Wee Loke Choon and Khu Tee Sing on illegal four-digit lottery activities and that he had recommended necessary actions be taken against them, including detention under the Restricted Residence Act 1933.

[12] As a result of the said actions, he believed that he had been victimised and that these persons were waiting for the right opportunity to destroy his career in the police force.

[13] Nevertheless on 31 January 1994 the respondent was formally informed in writing via a letter dated 25 January 1994, signed by one Dato' Yusof Said on behalf of the third appellant, that he was found in breach of all the disciplinary charges against him and that the sentence for each charge was that he be dismissed from the police force. The punishment was not what he had expected.

[14] Thus on 22 November 1994 the respondent filed a writ of summons against the appellants for declarations that his dismissal was unlawful, null and void and of no effect and that he was and still is an inspector of police, entitled to his salary, emoluments and such other benefits as a police inspector.

[15] The learned judge granted the declarations and orders sought after a full trial. He held that on the authority of *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169, the respondent was not given a reasonable opportunity of being heard under art 135(2) of the

Federal Constitution and that there had been a breach of the rules of natural justice. The learned judge found that the dates of the alleged breaches of discipline spanned over a long period of time, some of which were over a period of more than ten years before the respondent received the show cause letter. The dates were chosen at random and made it difficult for the respondent to put up a proper defence. The alleged breaches were related to offences of corruption. It was not known whether the complainant named in the charges were his accusers but if they were witnesses, it was only proper that the respondent be given the opportunity to know the nature of evidence against him and that he be allowed to cross-examine the witnesses. Further he was not supplied with any document relating to the charges. Although he failed to ask for any such document the learned judge was of the view that it was the fourth appellant's duty/responsibility to supply them in order to enable him to make an effective representation.

[16] The learned judge noted that even though the discretion whether or not to appoint a committee of inquiry was vested with the third/fourth appellant under general order 26(4) of the General Orders 1980, in the circumstances of this case the third/fourth appellant ought to have appointed a committee of inquiry to enable the respondent to defend himself effectively. As it was not done, there had been a breach of the rules of natural justice in the dismissal of the respondent.

[17] The General Orders 1980 regulates the conduct of officers in the public service in the performance of their duties, a breach of which would render any officer in the public service to any of the punishments or a combination of such punishments as set out in general order 36. The paramount objective is to maintain a clean and efficient public service with unimpeachable integrity, undivided loyalty and devotion to His Majesty and country: see general order 4(1).

[18] In recognition of their loyalty and devotion to the public service the General Orders 1980 had introduced certain safeguards for their protection lest they are accused of any breach of discipline. These safeguards are contained in Parts II and III of the General Orders 1980 under the headings 'Disciplinary Procedure' and 'Special Provisions' respectively.

[19] General Order 23 (subject to proviso therein) makes it mandatory that an officer shall not be dismissed or reduced in rank unless he has been informed in writing of the grounds on which it is proposed to take action against him and has been afforded a *reasonable opportunity of being heard*. A similar phrase is used in art 135(2) of the Constitution and its meaning had been fully explained by the Privy Council in *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] MLJ 169.

[20] There, the appellant, an inspector of police, challenged his dismissal by the Commissioner of Police after he was found guilty of a disciplinary offence, on the ground that he was not given a reasonable opportunity of being heard under art 135(2) of the Constitution. The only issue that survived the arguments before the Privy Council was one complaint relating to the report of the board of enquiry. This report contained a severe condemnation of the appellant. It was sent to the adjudicating officer but the appellant never had it. He never had an opportunity of dealing with it until the fourth day of his trial. This report contained in detail the evidence of each witness heard by the board of enquiry and expressed views as to the credibility of each witness and the weight to be attached to his statement.

[21] The question was whether the hearing by the adjudicating officer was vitiated by his being furnished with the report without the appellant being given an opportunity of correcting or contradicting it. The Privy Council held that the appellant was not given a reasonable opportunity of being heard. Lord Denning, in his judgment at pp 172–173 said:

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* (3) down to the decision of Their Lordships' board in *Ceylon University v Fernando* (4). It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing. Instances which were cited to Their Lordships were *Re Gregson* (5), *Rex v Bodmin Justices* (6) and *Good v Evans* (7), to which might be added *Rex v Architects Registration Tribunal* (8) and many others.

[22] Let us now look at the specific charges against the respondent. The fourth and fifth charges are interlinked. It was in respect of the respondent's failures to take action against the persons named in the charges for alleged illegal activities in or around Seremban between 1 January 1982 and 21 September 1990 and to report their activities to his superior. These charges seemed to show that there had been a continuous failure by the respondent to take action against the persons named therein and to report to his superior of their illegal activities which spanned over a period of more than eight years. Yet the respondent was only asked to show cause with a view to his dismissal only in 1993, about 11 years after the alleged breaches of discipline, which first occurred in 1982.

[23] The first and second charges are even more serious. They relate to offences of corruption or bribery. In the first charge the respondent was alleged of corruptly accepting a sum of RM1,000 per month from one Chong Lee Min on the following dates:

(a) between 1 January 1989–30 June 1989;

(b) between 1 August 1989–31 July 1990; and

(c) between 1 September 1990–18 September 1990.

[24] The respondent explained that he was never present at the alleged address. In the second charge the respondent was alleged of corruptly accepting a sum of RM200 per month between 1 January 1987 and 30 March 1989; and a sum of RM300 per month between 1 April 1989 and 21 September 1990, from one Khu Tee Sing.

[25] In the third charge the respondent was accused of associating himself with Chong Lee Lin and Khu Tee Sing knowing that they were actively involved in illegal four-digit lottery in and around Seremban.

[26] It appeared that the respondent's superiors had sat idly for a long time without taking any action against him although he had been alleged of accepting monthly corrupt money since 1 January 1987 until 21 September 1990 from specific individuals. There was no evidence that the accusations against the respondent were only made recently. It is incomprehensible how those glaring facts could have escaped the attention of the trained and watchful eyes of his superiors. It is safe to assume that statements must have been taken from the complainants or the persons identified in the charges to substantiate the allegations against the respondent. Otherwise those allegations were just bare allegations devoid of any merit. The respondent did not know when those allegations were made and had no idea what statements have been given to his superiors to enable him to correct or contradict the said statements. That put him in a disadvantageous position. He believed that those allegations were made by his accusers who had an axe to grind, as he was throughout his service in Negeri Sembilan, directly involved with investigation into secret societies activities, illegal gambling syndicate and vice activities. If the complaints against him were made after he went on a study leave, it would cast grave suspicion on the motives of his accusers. The only persons who knew the exact nature of the allegations and when they were made must be the third and/or fourth appellant apart from the disciplinary authority.

[27] There is no general right to an oral hearing under the General Orders 1980: see *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525, *Najar Singh v Government of Malaysia & Anor* [1974] 1 MLJ 138, *Zainal bin Hashim*

v Government of Malaysia [1979] 2 MLJ 276. Put it differently, a public servant facing disciplinary action under the General Orders 1980 is not, in all cases, entitled to an oral hearing. A fair hearing does not necessarily mean that there must be an opportunity to be heard orally. In *R (on the application of Ewing) v Department for Constitutional Affairs* [2006] 2 All ER 993 it was held that 'one is entitled to an oral hearing when fairness requires that there should be such a hearing, but fairness does not require that there should be an oral hearing in every case'. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made. It will also depend upon whether there are substantial issues of fact which can't be resolved on the available written evidence. This does not mean that, whenever there is a conflict of evidence in the statement taken, an oral hearing must be held to resolve it. See *R v Army Board of Defence Council, ex p Anderson* [1991] 3 All ER 375 at p 387.

[28] The framers of the General Orders 1980 had in their wisdom, saw it fit that there may be a need in appropriate cases for the disciplinary authority to seek further clarification. This intention is clearly expressed in general order 26(5) of the General Orders 1980. General Order 26(5) confers a discretion on the disciplinary authority to seek further clarification on the charges against the respondent through the appointment of a committee of inquiry. In plain language, it means that there is no total ban or prohibition for an oral hearing under the General Orders 1980. It depends on the circumstances of each case: see *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131. It is not a precondition that oral hearing must be at the request of the officer concerned. It is at the discretion of the disciplinary authority.

[29] But is the discretion vested with the disciplinary authority an absolute and unfettered discretion? Raja Azlan Shah Ag CJ (as he then was) in *Pengarah Tanah dan Galian, Wilayah Persekutuan (in this case the appellant in the appeal was the Land Executive Committee, and not, as stated in the appeal record, the Pengarah Tanah dan Galian however, the parties made nothing of this, presumably because the government agree that whoever is cited as appellant the government will be bound if the appellant loses — MNG Ed MLJ) v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 answered it in the following terms:

> I cannot subscribe to this proposition for a moment. Unfettered discretion is a contradiction in terms. My understanding of the authorities in these cases, and in particular the case of *Pyx Granite (ante)* and its progeny compel me to reject it and to uphold the decision of the learned judge. It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days

A when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law.

B **[30]** Lord Green MR in *Associated Provincial Pictures Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680 at pp 682–683 said:

C The exercise of such discretion must be a real exercise of the discretion. … For instance, a person entrusted with a discretion must direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to the matter that he has to consider.

D **[31]** Lord Green's view in the abovesaid case was reaffirmed by the House of Lords in *Padfield and others v Minister of Agriculture, Fisheries and Food and others* [1968] AC 997: see Lord Denning's judgment at p 1007.

E **[32]** In *Breen v Amalgated Engineering Union and others* [1971] 2 QB 175, Lord Denning MR at p 190 said:

> It is now well settled that a statutory body which is entrusted by statute with a discretion, must act fairly. Later at the same page, His Lordship added:

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> > If the rules set up a domestic body and give it a discretion, it is to be implied that the body must exercise its discretion fairly. Even though its functions are not judicial or quasi judicial, but only administrative, still it must act fairly. Should it not do so, the courts can review its decision, just as it can

G review the decision of a statutory body.

[33] So, how do you determine whether a body entrusted with discretion had acted fairly? Taylor LJ in *R v Army Board of the Defence Council, ex p* [1991] 3 All ER 375 endorsed what Lord Bridge in *Lloyd v McMahon* [1987] All ER 1118 at p 1161 said:

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I My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better express the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure

prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

[34] *De Smith's Judicial Review* (6th Ed) at p 479 concisely sums up the law thus:

A decision-making body exercising public functions which is entrusted with discretion must not, by the adoption of a fixed rule or policy, disable itself from exercising its discretion in individual cases. It may not 'fetter' its discretion. A public authority that does fetter its discretion in that way may offend against either or both of two grounds of judicial review: the ground of legality and the ground of procedural propriety. The public authority offends against legality by failing to use its powers in the way they were intended, namely, to employ and to utilize the discretion conferred upon it. It offends against procedural propriety by failing to permit affected persons to influence the use of that discretion. By failing to 'keep its mind ajar', by 'shutting its ears' to an application, the body in question effectively forecloses participation in the decision-making process.

[35] In *Chai Kok Choi v Ketua Polis Negara & Ors* [2008] 1 MLJ 725; [2008] 1 CLJ 113 the Federal Court was asked to decide on the following question of law:

Is it within the purview of the court to hold in any particular case that the facts and surrounding circumstances require the disciplinary authority to afford the applicant an oral hearing so as to meet the requirements of procedural fairness when it is obvious that crucial matters in favour of the applicant were not taken into account or considered by the said disciplinary authority in the disciplinary process?

[36] The Federal Court at p 731 (MLJ); p 121 (CLJ) answered that, 'an oral hearing might have been necessary if the applicant had not admitted committing the offences'. Thus, it is implicit that the disciplinary authority's discretion is not absolute. In *Ghazi bin Mohd Sawi v Mohd Hanif bin Omar, Ketua Polis Negara Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333 the Supreme Court (as it then was) in dismissing the appellant's contention that he was not given an oral hearing, did not altogether rule out the possibility of an oral hearing if there had been a breach of the rules of natural justice or failure to apply the Wednesbury principles of unreasonableness (see p 342). In *Ang Seng Wan v Suruhanjaya Polis Di Raja Malaysia & Anor* [2002] 2 MLJ 131 the Court of Appeal allowed the appellant's appeal against his dismissal by the first respondent on the ground, inter alia, that there was a failure to hold an oral hearing when the facts in that case justify the holding of an oral hearing. In that case the appellant denied receiving bribes through one Sanmugan. Sanmugan however made a statutory declaration denying accepting the bribes on behalf of the appellant.

[37] The facts before us are not dissimilar with the facts in *Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [1994] 2 MLJ 114; [2008] 1 CLJ 773 except that in that case there was a request for an oral hearing. There, the appellant, a police inspector was posted to Negeri Sembilan Police Contingent Headquarters as a training officer. He was hauled up before the disciplinary board for several charges. The first charge was that he received monthly corrupt money of RM200 from one Chong Lee Lin from 1 August 1989 to 22 September 1990. The second charge was for receiving monthly corrupt money of RM100 one Lue Chan Kong between 1 June 1989 and 22 September 1989. The third charge was for associating himself with one Chong Lee Lin between 1 August 1989 and 22 September 1990 knowing that she was an organiser of illegal four-digit lottery in or around Seremban. He was found guilty on all the charges and dismissed from the police force. His request for an oral hearing was turned down. He applied to the High Court for a declaration that his dismissal was null and void. It was dismissed. On appeal, the Court of Appeal allowed his appeal. Ariffin Zakaria JCA (as he then was) said:

> [26] In the circumstances, after considering the charges leveled against the plaintiff, we are of the view that in all fairness the plaintiff ought to have been given an oral hearing as requested by him. Similarly documentary and other evidence purportedly relied upon by the first defendant in arriving at his finding ought to have been made available to him to enable the plaintiff to make an effective and meaningful defence to the charges. In the circumstances we agree with the plaintiff's counsel that there had been a clear breach of the rules of natural justice as embodied in art 135(2) of the Federal Constitution which renders the disciplinary proceedings null and void. In this regard we are reminded of the observation made by Lord Denning in *B Surinder Singh Kanda v The Government of The Federation of Malaya* [1962] MLJ 169 at p 172; [1962] 1 LNS 14 which reads:
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> > If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education v Rice* [1911] AC 179; 182; 27 TLR 378 down to the decision of Their Lordships' board in *Ceylon University v Fernando* [1960] 1 WLR 223; [1960] 1 All ER 631).

[38] Apparently Chong Lee Lin and Lue Chan Kong were also the same characters who were identified in the charges against the appellant in *Mat Ghaffar bin Baba v Ketua Polis Negara & Anor* [1994] 2 MLJ 114; [2008] 1 CLJ 773 and the appellant in *Yusof bin Sudin v Suruhanjaya Perkhidmatan Polis &*

Anor [2008] 2 MLJ 1; [2008] 4 CLJ 881. In *Mat Ghaffar*'s case, the appellant, a police inspector, was charged and dismissed for receiving bribes from them at about the same time, namely, between 1 September 1988 and September 1990 at the same address, namely, No 30 Jalan Tuanku Munnawar, Seremban. These facts were stated in the charges which appeared in the appellant's statement of claim against the respondents.

[39] In *Yusof Sudin*'s case, an Assistant Superintendent of Police attached to the Police Contingent Headquarters, Negeri Sembilan, was slapped with five disciplinary charges and dismissed from the police force. These charges were reproduced in the judgment of the Court of Appeal. The place where the appellant was alleged to have accepted the bribe was also at No 30 Jalan Tunku Munnawar, Seremban.

[40] From the perusal of the charges in the two cases above and the charges in this instant appeal it appeared that there was no doubt that Chong Lee Lin and Lue Chan Kong were actively involved in the syndicate on illegal four digits lottery in Seremban. Ironically, that led to the police officers being disciplined and dismissed from the police force.

[41] Let us now turn to the facts in the instant appeal. Was there sufficient material before the disciplinary authority for it to consider that the respondent's case would require further clarification and the setting up of a committee of inquiry?

[42] It seemed that the respondent's tenure as an investigation officer in the Police Contingent Headquarters Negeri Sembilan was full of trials and tribulations. The respondent had to cope with a myriad of allegations basically due to the nature of his work. The unfounded allegations levelled against him and the facts which formed the basis of disciplinary charges against him, all happened at or about the same time. Yet the respondent persevered and his services were duly recognised when he received letters of commendations from two successive state police officers. But there were evil forces working against him. One thing was however clear. The allegations against the respondent which turned out to be untrue or unsubstantiated and the facts which formed the basis of the disciplinary charges against him were within the knowledge of the third or fourth appellant. The Director of Criminal Investigations who cleared him of the allegations, wrote the letter dated 26 April 1989 on behalf of the third appellant. The show cause letter dated 27 September 1993 was signed by one Mohd Yusuf Said on behalf of the fourth appellant. The respondent's reply to the show cause letter was addressed to the third appellant. In short, all

A the information in favour of and against the respondent were already within the knowledge of his superiors in Bukit Aman police headquarters. Based on that information they should be able to weigh and evaluate the evidence against the respondent fairly and justly and decide whether or not to seek further clarification from the respondent.

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[43] We have read the respondent's written representation and verified its contents with the facts and particulars in Appendix A–K. These appendices contained the monthly minutes of the meetings held at the Police Contingent C Headquarters at Seremban. What the respondent said in his written representation were substantiated by the minutes of the meetings. The involvement of Chong Lee Lin and Lue Chan Kong, among others, in secret societies activities and illegal gambling syndicate were discussed at the monthly meetings and the respondent had in fact recommended appropriate actions be D taken against them, including detention under the Restricted Residence Act 1933. What the respondent said in his written representation was not just bare denials. He had also earlier been cleared of somewhat similar allegations. That was a factor in his favour.

E **[44]** The allegations of fact in the present charges against him spanned over several years. There was a long and unexplained delay in instituting disciplinary action against him. He had been told that the show cause letter was with a view to his dismissal. It must be borne in mind that there is no remedy for appeal under the General Orders 1980. The decision that the disciplinary authority F was about to make, in view of the gravity of the charges against him would be irreversible. The long delay in issuing the show cause letter and in instituting the disciplinary action against the respondent is not by itself a ground for holding that there was procedural unfairness (*Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l* G *R Marimuthu, deceased)* [2008] 6 MLJ 1; [2008] 6 CLJ 573). But when it is viewed together with the other facts as adverted to earlier it should have prompted an alert disciplinary authority to call for further clarification to ascertain the truth of the allegations against the respondent.

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[45] In the circumstances of this case we were of the view that the disciplinary authority, in exercise of its discretion, had not fairly or adequately considered the written representation by the respondent. It had not fully weighed and appreciated the respondent's representation which was not mere I denials. By failing to keep an open mind and to consider calling him for further clarification the disciplinary authority had effectively closed its doors to the respondent and in the process fettered its own discretion. Thus, the respondent was denied the reasonable opportunity to have his case heard before the disciplinary authority.

[46] For the aforesaid reasons, we dismissed the appeal with costs.

Appeal dismissed with costs.

Reported by Kohila Nesan